Supreme Court, U.S.
FILED
NOV. 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-189

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES R. RICKETTS, Director,
Arizona Department of Corrections, et. al.,

Petitioners,

vs.

JIMMIE WAYNE JEFFERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
Criminal Justice Legal Fdn.
2131 L Street
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

BEST AVAILABLE COPY

Question Presented

May a federal court set aside a state court's finding of an aggravating circumstance in a capital case without applying a standard that requires some deference to the state court's finding?

TABLE OF CONTENTS

Table of Authorities Cited iii

Interest of Amicus 1

Summary of Facts and Case 2

Summary of Argument 3

Argument 4

I

The aggravating circumstance question has four components: definition, adequacy, application and correctness 4

A. Definition and adequacy (*Cartwright*) 5

B. Application and correctness (*Godfrey*) 6

II

The Court of Appeals applied the wrong standard of review . 8

A. Definition 8

B. Adequacy 9

C. Application 10

D. Correctness 11

Conclusion 13

TABLE OF AUTHORITIES CITED

Cases

Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977) 7

Brown v. Allen, 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (1953) 10

Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) . . . 5, 6

Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986) 4, 6

Darr v. Burford, 339 U.S. 200, 94 L.Ed. 761, 70 S.Ct. 587 (1950) 10

Ex parte Hawk, 321 U.S. 114, 88 L.Ed. 572, 64 S.Ct. 528 (1944) 10

Frank v. Mangum, 237 U.S. 309, 59 L.Ed. 969, 35 S.Ct. 582 (1915) 10

Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) 6, 9

Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) 6, 7, 11

Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976) 7, 9

Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976) 7

Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979) 11

Jeffers v. Ricketts, 627 F. Supp. 1334 (D. Ariz. 1986) 3

Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987) 12

Jurek v. Texas, 428 U.S. 262, 49 L.Ed.2d 929, 96 S.Ct. 2950 (1976) 9

Marshall v. Lonberger, 459 U.S. 422, 74 L.Ed.2d 646, 103 S.Ct. 843 (1983) 10

Maynard v. Cartwright, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) 5

Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975) 9

Patton v. Yount, 467 U.S. 1025, 81 L.Ed.2d 847, 104 S.Ct. 2862 (1984) 8, 10

State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983) 4, 9

State v. Jeffers, 235 Ariz. 404, 661 P.2d 1105 (1983) . 2, 3, 11, 12

Sumner v. Mata, 455 U.S. 591, 71 L.Ed.2d 508, 102 S.Ct. 1322 (1982) 10

Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977) 8

Statutes

28 U.S.C. § 2254(d) 4, 10

Ariz. Rev. Stat. § 13-703(F)(6) 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES R. RICKETTS, Director,
Arizona Department of Corrections, et. al.,

Petitioners,

vs.

JIMMIE WAYNE JEFFERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of

---

1. CJLF has received written consent of the parties to file this brief.

society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case involves the relitigation of a question fully and fairly litigated in the state courts with proper respect for this Court's precedents and for the constitutional rights of the respondent. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

While in jail in 1976, Jimmie Wayne Jeffers attempted to solicit another jail inmate to kill Penelope Cheney. His apparent motive was retaliation for Ms. Cheney's cooperation with the police regarding Jeffers' heroin dealings. After his release from jail, Jeffers killed Ms. Cheney himself. He injected her with a drug overdose, choked her with a belt and his hands, and forced another person to inject more drugs. He then beat her while calling her a "bitch" and a "dirty snitch." While delivering blows, he said "This one's for [naming various names]." He left the body in the shower stall of his motel room for three days. Then he buried it in a shallow grave in a remote area. Wild animals soon unearthed and devoured the body. *State* v. *Jeffers*, 135 Ariz. 404, 661 P.2d 1105, 1113-1114, 1130-1131 (1983).

Jeffers was convicted by the jury and sentenced to death by the court. After the Arizona Supreme Court ordered resentencing, he was sentenced to death again. The trial court found as aggravating circumstances that Jeffers had caused a great risk of death to a second person and that the killing was especially heinous, cruel and depraved.

On appeal, the Arizona Supreme Court gave careful consideration to Jeffers' attack on the aggravating circumstances. The court reversed the great risk of death circumstance and the finding that the killing was especially cruel. *State* v. *Jeffers*, 235 Ariz. 404, 661 P.2d 1105, 1130 (1983). However, after discussion of numerous other Arizona cases defining and limiting the terms "heinous" and "depraved," the court upheld the finding that the killing was especially heinous and depraved. *Id.* at 1130-1131.

Jeffers filed a petition for habeas corpus in the federal district court. After a thorough discussion of Jeffers' contentions, the district court decided that his claims were meritless. *Jeffers* v. *Ricketts*, 627 F. Supp. 1334 (D. Ariz. 1986). A divided panel of the Ninth Circuit reversed. Although reaffirming that this aggravating circumstance is constitutional, Cert. Pet. A23-A26, the majority conducted its own comparison of this case with other Arizona cases and decided that "[b]ecause the standard of heinousness and depravity delineated in prior Arizona cases cannot be applied in a principled manner to Jeffers, his death sentence must be struck down as arbitrary." *Id.* at A40.

SUMMARY OF ARGUMENT

This case presents the question of what degree of deference a federal habeas corpus court must pay to a decision of the state court that an aggravating circumstance exists in a capital case. That question is a complex one because aggravating circumstances have a complex character. They are determinations of fact on an issue of state law which has been created in response to a federal requirement. Not surprisingly, there has been considerable confusion.

Amicus submits that the question breaks down into four separate issues. First, what is the definition of the aggravating circumstance? Second, does that circumstance, as defined, perform the function required by federal law? Third, did the factfinder actually apply that definition to the present case? Fourth, do the facts of the case actually fit the definition?

These four questions are questions of state law, federal law, procedural fact and ultimate fact, respectively. Based on the habeas corpus statutes and this Court's decisions to date, the respective degrees of deference are: state law — absolute; federal law — none; procedural fact — 28 U.S.C. § 2254(d); ultimate fact — evidence sufficient for any rational factfinder.

ARGUMENT

I. The aggravating circumstance question has four components: definition, adequacy, application and correctness.

The Court of Appeals saw the aggravating circumstance question as one of whether the statute was "unconstitutionally vague on its face and as applied." Cert. Pet. A24. This is a two-step approach looking first at the bare words of the statute and second at this case as compared with others. For the first step, the court referred to its prior decision in *Chaney* v. *Lewis*, 801 F.2d 1191, 1194-1196 (9th Cir. 1986). The remainder of the opinion is the "as applied" step.

A better description of the questions presented by this kind of statute was given by the Arizona Supreme Court in *State* v. *Gretzler*, 135 Ariz. 42, 659 P.2d 1, 9 (1983):

> "The application of such a provision may be constitutionally infirm for either of two reasons. First, a state's highest tribunal may fail to adopt a construction of its statute sufficiently narrow to make sentencing discretion 'suitably directed and limited.' *Gregg v. Georgia*, supra, 428 U.S. at 189, 96 S.Ct. at 2932, 49 L.Ed.2d at 883 (1976) (judgment of the Court and opinion of Stewart, Powell, and Stevens, J.J.) (upholding Georgia's death penalty statute). Secondly, the state tribunal may stray in an individual case from an otherwise constitutionally narrow construction. *See Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (reversing one individual application of Georgia's death penalty statute)."

The two questions identified by the Arizona Supreme Court, the *Cartwright* question and the *Godfrey* question, have two components each, giving a total of four issues.

A. Definition and Adequacy (Cartwright).

The correct mode of analysis on the first question is the inquiry set forth in *Maynard* v. *Cartwright*, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The "on its face" versus "as applied" analysis undertaken by the Court of Appeals in this case is similar to the approach rejected by this Court in *Cartwright*.

Cartwright involved a crime which most people would agree was especially heinous, cruel *and* depraved. See 108 S.Ct. at 1856, 100 L.Ed.2d at 378. Even so, the Tenth Circuit reviewed the body of Oklahoma case law and determined that the Oklahoma Court of Criminal Appeals had abandoned its prior, narrowed construction for a diffuse, undefined one. *Cartwright* v. *Maynard*, 822 F.2d 1477, 1487 (10th Cir. 1987).

The court specifically noted that this was not a case like *Godfrey*, which was a case of "an aberrational lapse" in the application of a valid standard. *Id*. at 1491. Instead, "there is no constitutionally adequate narrowing construction adopted by the state courts that we can apply to this case." *Id*. at 1492.

On certiorari, the State argued that even if the standard were vague, Cartwright's case clearly fell "within reach of the language at issue" and the sentence could therefore be upheld. *Maynard* v. *Cartwright*, *supra*, 108 S.Ct. at 1857, 100 L.Ed.2d at 380. "The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment." *Id*. at 1857-1858. The correct analysis of the constitutionality of the state standard is to examine the entire body of case law to determine if the statute has received a sufficiently narrowing construction that the sentencer is not left "with the kind of open-ended discretion which was held invalid in *Furman* v. *Georgia*, 408 U.S. 238 (1972)." *Id*. at 1858. This involves two questions. First, how is the circumstance defined under state law? Second, does that circumstance adequately provide a meaningful basis to select death-eligible cases? We will return to these questions in part II, below.

B. Application and Correctness (Godfrey).

Cartwright relies heavily on *Godfrey* v. *Georgia*, 446 U.S. 420 (1980) for the underlying requirement of a principled way to distinguish death-eligible cases from non-death-eligible cases. *Cartwright*, 108 S.Ct. at 1858-1859, 100 L.Ed.2d at 381-382. Nevertheless, the two cases involve different questions.

In *Godfrey*, unlike *Cartwright*, the Georgia Supreme Court had duly narrowed the definition of the circumstance in its other cases, 446 U.S. at 430-432, but neither the jury nor the state court had ever applied that restricted definition to Godfrey's case. *Id*. at 432. The trial judge simply instructed the jury in the literal words of the statute. *Id*. at 426. The state supreme court did no further narrowing in its review. See *id*. at 427.

The essence of the *Godfrey* problem, then, is that there were two *different* definitions of the circumstance in Georgia. First, there was the definition in the bare words of the statute. The plurality in *Gregg* v. *Georgia*, 428 U.S. 153, 201 (1976) had already implied that this definition was too broad to adequately distinguish death-eligible cases from others. Second, there was the narrowed, constitutionally valid definition established in *Harris* v. *State*, 237 Ga. 718, 230 S.E.2d 1 (1976) and *Blake* v. *State*, 239 Ga. 292, 236 S.E.2d 637 (1977). See *Godfrey*, *supra*, 446 U.S. at 430-432. The question was, which of these two definitions had the factfinder applied?

The *Godfrey* plurality did undertake an examination of "the facts and circumstances of the murders that he was convicted of committing." 446 U.S. at 432. The purpose of that examination, though, was not to second-guess the factfinder. The examination was necessary because the ambiguity of the state court opinion left open the question "whether . . . the Georgia Supreme Court can be said to have *applied* a constitutional construction . . . ." *Ibid*. (italics added). *Godfrey* does *not* open up to relitigation *de novo* the question of whether a construction which was clearly applied had been applied correctly.

The dissenters feared that the plurality had done exactly that. 446 U.S. at 443 (Burger, C. J.); *id.* at 451 (White, J.). "[O]ur role is not to peer majestically over the lower

court's shoulder so that we might second-guess its interpretation of facts that quite reasonably — perhaps even quite plainly — fit within the statutory language." *Id.* at 450. If such a role is undesirable in this Court on direct review, it is far worse to allow such second-guessing by the lower federal courts on habeas corpus. Cf. *Patton* v. *Yount*, 467 U.S. 1025, 1038 (1984). That kind of review would reduce the state trial to nothing more than a preliminary hearing for the habeas proceeding. Cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

To avoid the ill-effects which the *Godfrey* dissenters warned against, it is necessary to separate the legal and procedural question of what standard the factfinder applied from the ultimate question of whether the factfinder arrived at the "correct" answer.

We thus have four questions: (1) What is the definition of the circumstance? (2) Does that circumstance fulfill the requirement of a meaningful separation of death-eligible from non-death-eligible cases? (3) Did any state court or jury, at any stage in the process, apply that definition to the facts of the present case? (4) Did the factfinder in applying that definition "get the right answer"? The standard of review is different for each question.

II. The Court of Appeals applied the wrong standard of review.

A. Definition.

The definition of the aggravating circumstance is initially for the state legislature. In this case, the Arizona Legislature has defined the circumstance only in the vague words "in an especially heinous, cruel or depraved

manner." Ariz. Rev. Stat. § 13-703(F)(6). The interpretation of this language is the responsibility of the Arizona Supreme Court. That court has extensively discussed this language in *State* v. *Gretzler*, 135 Ariz. 42, 659 P.2d 1, 9-12 (1983) and in the other cases discussed by the court below, by the dissenting judge, and by the parties. Cert. Pet. 16-23, A27-A39, A66-A70; Resp. Opp. 5-8.

As this Court has said many times, the state supreme court's construction of the state statute is not reviewable by a federal court. See, e.g., *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975).[2] An otherwise unconstitutional death penalty statute can be saved by construction, see *Gregg* v. *Georgia*, 428 U.S. 153, 201 (1976) (narrowing construction), even if that construction appears to defy the plain wording of the statute. See *Jurek* v. *Texas*, 428 U.S. 262, 272 (1976) (construction of future dangerousness special issue as permitting consideration of all mitigating evidence).

The standard of review on definition of the circumstance is therefore the simplest. There is no review. The aggravating circumstance is what the state supreme court says it is.

B. Adequacy.

The adequacy of the aggravating circumstance to perform the narrowing function required by *Furman* v. *Georgia*, 408 U.S. 238 (1972) and its progeny is a question of federal law. Since 1953, federal habeas courts

---

2. *Mullaney* indicated a possible exception for constructions which were an obvious subterfuge to raise a state procedural bar to review of a federal question. *Id.* at 691 n. 11. This exception is inapplicable to the kind of substantive law question presented here.

have reviewed such questions *de novo*, following the outline in Justice Frankfurter's concurring opinion in *Brown* v. *Allen*, 344 U.S. 443, 507-508 (1953).[3]

Analysis of the merits of the *Cartwright* question is not within the question presented for certiorari in this case, but it is squarely presented in *Walton* v. *Arizona*, 88-7351, *cert. granted* 58 U.S.L.W. 3181 (Oct. 2, 1989). We therefore defer the briefing of this issue to that case. Assuming the aggravating circumstance as defined by the whole body of Arizona case law to be constitutionally adequate, we proceed to the next question.

C. Application.

Absent a clear record, such as jury instructions, there may be a factual dispute as to whether the factfinder applied the constitutional, narrowed definition or the unconstitutionally broad definition. This is the kind of historical fact underlying a federal legal question for which Congress has mandated deference to the state courts. 28 U.S.C. § 2254(d). Similar underlying facts requiring such deference include the actual advisements given a defendant at a prior proceeding with an ambiguous record, *Marshall* v. *Lonberger*, 459 U.S. 422, 431-432 (1983); whether a potential juror is actually biased, *Patton* v. *Yount*, 467 U.S. 1025, 1036-1038 (1984); and whether witnesses were under pressure from authorities, *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982).

---

3. Prior to that time, this Court had stated repeatedly that federal courts had the discretion to defer to the prior state-court adjudication. *Ex parte Hawk*, 321 U.S. 114, 118 (1944); *Darr* v. *Burford*, 339 U.S. 200, 215 (1950); *Frank* v. *Mangum*, 237 U.S. 309, 334 (1915).

In the present case, we have the Arizona Supreme Court's extended discussion of the definition in the course of its independent determination of the truth of the circumstance. *State* v. *Jeffers*, 661 P.2d 1105, 1130-1131 (1983). The court had previously decided that gratuitous violence beyond that needed to kill constitutes special heinousness and depravity of mind. This is true even when the violence does not constitute cruelty because the victim is unconscious or dead. *Id.* at 1131. The court had also previously decided that apparent relish of the killing constitutes an especially heinous and depraved state of mind. *Ibid.* The court found both the gratuitous violence and apparent relish facts true and from them found the heinous and depraved circumstances true. *Ibid.* The Arizona court's analysis is in sharp contrast with the scanty comments of the state court in *Godfrey* v. *Georgia*, 446 U.S. 420, 427 (1980). The Arizona court clearly applied the narrowed standard established in its decisions and not the impermissibly broad definition of the bare words of the statute. The *Godfrey* problem is not presented here.

D. Correctness.

The final question is whether, even though the factfinder applied the correct, constitutional definition of the circumstance, the factfinder nonetheless arrived at the wrong answer. Such a claim, by itself, fails to present a federal question. Only if there is so little evidence in the record that *no* rational factfinder could have been convinced to the requisite degree of confidence can a federal habeas claim be made. *Jackson* v. *Virginia*, 443 U.S. 307, 313 (1979).

It is here that the Court of Appeals makes its worst mistake, adopting the interpretation of *Godfrey* advanced in the dissent, rather than what the plurality opinion

actually says.[4] "Illuminated as the above standard is by the case examples furnished by the Arizona Supreme Court, it seems to call for conduct or attitudes more shocking than those exhibited by Jeffers." *Jeffers* v. *Ricketts*, 832 F.2d 476, 484 (9th Cir. 1987). The Court of Appeals then proceeded to make its own determination of "shockingness," usurping the core function of the finder of fact.

The State of Arizona has chosen to authorize its Supreme Court to review the factfinding independently. *State* v. *Jeffers*, *supra*, 661 P.2d at 1130. That decision does not authorize federal habeas court to do the same. If the definition of the circumstance is constitutional and if the factfinder actually employed that definition, then the factfinder's determination can only be questioned under *Jackson*. The factual finding stands if *any* rational factfinder could have found this murder especially "heinous" or "depraved" as those terms have been defined by the Arizona Supreme Court in this and other cases.

The Court of Appeals' opinion that Jeffers showed less relish for the crime than certain other defendants, Cert. Pet. A34-A37, and that this case involves less gratuitous violence than some others, *id.* A37-A39, is simply a disagreement in the application of the definition to the facts of this case. This is no different than second-guessing a jury's determination of whether a killer acted with "malice" or whether conduct was reckless rather than negligent. These subjective determinations are entrusted to the factfinder. They may be reviewed on federal habeas corpus only under *Jackson*. This case

---

4. See pp. 7-8, *supra*. If every decision were interpreted to mean what its own dissent says it means, the legal landscape would be bizarre indeed.

easily clears the *Jackson* hurdle. A rational factfinder could easily find that Jeffers both relished the crime and inflicted gratuitous violence.

Conclusion

The decision of the Court of Appeals should be reversed and the judgment of the district court denying the petition reinstated.

Dated: November, 1989

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation